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In The

SUPREME COURT OF THE UNITED STATES

————Term, 1942

MASSACHUSETTS BONDING & INSURANCE COMPANY,
Petitioner.

VS.

MRS. E. S. MASSEY, ET AL, *Respondents*

PETITION FOR WRIT OF CERTIORARI.

May It Please The Court:

The petition of Massachusetts Bonding & Insurance Company respectfully shows this Honorable Court:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This is a Workmen's Compensation case brought by respondents, Mrs. E. S. Massey for herself and three minor children, against petitioner, as insurance carrier for Royal Oil & Gas Corporation, who employed Massey, claiming

compensation by reason of the death of said Massey for alleged injuries received in the course of his employment.

Respondent alleged as a cause of action that Massey strained, over-exerted, and tore himself on August 31st, and that on November 15th he injured and strained himself and aggravated previous injuries, and on November 28th he further injured himself by working, and aggravated his previous injuries, and that near noon of November 29th, 1939, he died of syphilitic heart failure. Briefly, the evidence showed that on August 31st Massey, with a helper, carried some pipe, performed other light work through the day, quitting about 4:40 P. M. No evidence whatever showed he was strained or torn or damaged. He said he was tired after a usual day's work, and that night late he complained of feeling a choking sensation and took some alkaseltzer, and late in the night walked the floor some. Next day he got up, looked after his engine, rested practically all day, and that night he again had choking sensations, was examined by a doctor early in the morning of September 2nd, and sent to a hospital, later he went home and to bed until October 15th. He took over his job as pumper on the last named date. November 15th he assisted in directing work with reference to installing a cooler for the engine. There was no strain, or not even any work that day. He says that he had been instructed in no event to raise his hands above his head. He did his work on the lease and carried on his 24 hour duties as a pumper until his death, on the 29th of November. *On November 28th he had engine*

trouble, got a new head, and a man hired especially for the purpose put it on for him. Massey stayed on the job until about 11:30, went to bed, *and was up sometime before daylight*, had opportunity to work, and may be worked some that morning. He came in about seven, had breakfast, no complaint, went out to work again, came in about 11:15, sat and warmed himself, no complaint, went out for his car to go on to other work about 11:30, and a little later was found dead near his car.

Medical testimony for respondent showed that respondents' witness, Dr. Powers, was a heart specialist, and after examination about September 2nd, the other doctor referred the case to Dr. Powers. At that time Massey had a syphilitic heart of long standing three to ten years), that he "was ripe for death, work or no work;" "that the disease runs a definite, established course, and unless checked in its early stages, ends, in a given time, only in death; and that the doctor saw him too late, and that he was in such condition that even to interfere with his rest" was in effect an invitation to death.

At the close of the evidence petitioner requested a preemptory instruction (record, page 148), and asked specifically that if the case was to be submitted over plaintiff's request for instruction that the jury be limited to a consideration only of the last day and night's work. (see record, pp. 154-5).

The substance of the decision complained of is that the court holds:

> "It seems to be plaintiff's contention that there must be direct evidence that the death was caused by, that is, connecting the death with, a particular exertion or activity. This will not do. It is sufficient, if, taking all the facts and circumstances, there is a reasonable basis for the conclusion that in the course of his employment, there was an exertion, *the accidental and unlooked for result of which was a physical injury* to his heart, causing its failure and death."

And the court further held that,

> "The only thing the act requires is that the death or injury for which compensation is sought *be shown to be wholly or partly the result of some work or activity* connected with the employment and not the mere result of disease."

The above holdings are exactly contrary to both our Workmen's Compensation Statute and the decisions of our Supreme Court, in this: Our Workmen's Compensation Act defines injury as "harm or damage to the physical structure," and our Supreme Court has interpreted this to mean: (1) Such *injury* must have been *accidental;* (2) such injury must be capable of being traced to a definite time, place and cause; (3) if injury is alleged to have arisen from exertion or strain, it must be shown that such exertion or strain was not one to which the general public was equally exposed.

Again, the holding:

> "It is sufficient, if, taking all of the facts and circumstances, there is reasonable basis for conclusion that in the course of his employment, there was an exer-

> tion, the accidental and unlooked for results of which was a physical injury to the heart, causing its failure and his death,"

is contrary to our Workmen's Compensation Act in this: Our law covers only accidental injury. This opinion by the court makes it not only cover accidental injury, but any exertion, "the accidental and unlooked for results of which was a physical injury" (we had thought that results were never accidental), and still again the holding:

> "The only thing the Act requires is that the death or injury for which compensation is sought be shown to be wholly or partly the result of some work or activity connected with the employment, and not the mere result of disease,"

is contrary to all of our decisions in that the criterion laid down by the court that the only thing the act requires is that the injury be wholly or partly the result of some work or activity, while the settled law of our State is that it must be (1) accidental; (2) capable of being traced definitely to a time and place; and (3) that the exposure for injury by strain or exertion was not such as the general public is ordinarily exposed to. We believe, therefore, that the opinion of the Circuit Court is directly contra to the settled law as determined by the courts of this State.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

I.

Said Honorable Circuit Court of Appeals has rendered a decision repugnant to the Workmen's Compensation Act of Texas, and, contrary to the settled law of this State, has held that if there is a reasonable basis for the conclusion that in the course of employment there was an exertion, the accidental and unlooked for result of which was physical injury, that the same establishes a compensable injury, when our courts have repeatedly held that the injury must (1) be accidental; and (2) capable of being definitely located as to time, place and cause, and by so deciding the court has ignored the doctrine of *Thompson vs. Erie Railroad,*

We cite several opinions here that are contra to this case:

Subdivision 5 of Section 1, Art. 8309, R. C. S., is as follows:

> The terms "injury" and "personal injury" shall be construed to mean damage or harm to the physical structure of the body and such diseases or infection as naturally result therefrom.

This has been repeatedly construed by our Supreme Court to cover accidental injury only which may be located definitely as to time and place.

Middleton vs. Texas Power & Light Co., 108 Texas 96-109; 185 S.W. 556;

Gordon vs. Travelers Insurance Company, 287 S.W. 911;

United States Casualty Co. vs. Vance, 91 S.W. (2) 465;

Consolidated Underwriters vs. Christal (writ refused), 135 S.W. (2) 127;

Southern Casualty Company vs. Flores, 1 S.W. (2) 260.

II.

The Honorable Circuit Court of Appeals has decided that where syphilis has destroyed the valves and muscles of the heart so that deceased was ripe for death, work or no work, and was injured to such extent that even to interfere with his rest was in effect an invitation to death, and that where the deceased has done exactly the kind of work for years before the day charged, and after a rest period of six weeks he continued the same kind of work for a month and a half to his death, and the court allowed the respondents, after Massey's death, to choose three days and incidents in those days that could not be different from other days that he worked both before and after the incidents alleged, and choosing these particular days and incidents over a period of three months from the alleged injury, allowed the respondent to recover, which is contrary to our statutes and the settled law of this State, as decided in *Odom vs. Indemnity Insurance Company*, 111 S.W. (2) 1143 (see paragraph 5, pg. 1146, through the close of the opinion), and

contrary to all the cases holding that such accidents are traceable to a definite time and place.

III.

The Honorable Circuit Court of Appeals has held,

> "The only thing the Act requires is that the death or injury for which compensation is sought, be shown to be wholly or partly the result of some work or activity connected with the employment",

which holding is contrary to the decisions of our Supreme Court and the settled law of Texas, in that the Texas law requires (1) accidental injury (not that injury be the result of some work or activity connected with the employment); and (2) that same must be definitely traced to a time, place, etc.

IV.

Said Honorable Circuit Court of Appeals erred in rendering the decision it rendered, in that the evidence fails to show that the deceased was, even if he was injured by exertion, more exposed to hazards at the time than was the general public, which holding is in conflict with decisions of the Texas law.

V.

Said Honorable Circuit Court of Appeals has rendered a decision in conflict with its own decisions in many in-

stances, including *Fidelity & Casualty Company of New York vs. Neas*, 93 Fed. (2d) 137.

VI.

The Honorable Circuit Court of Appeals has decided an important question of local law in a way in conflict with applicable local decisions.

VII.

Said Honorable Circuit Court of Appeals has decided this particular case so that if its doctrine is applied generally to Workmen's Compensation cases in Texas it means that carriers of such compensation insurance provide health and life insurance in addition to the ordinary Workmen's Compensation Act that covers only accidental injuries, and such diseases or infections as naturally result from the injury.

VIII.

Said Honorable Circuit Court of Appeals erred in affirming the case and considering the testimony as to the incidents of August 31st and November 15th, because same were not admissible, and the jury should have been instructed not to consider same.

Petitioner accompanies this petition by a brief in support thereof, and also presents herewith a transcript of the record in the Circuit Court of Appeals.

WHEREFORE, your petitioner respectfully prays that writ of certiorari issue out of and under the seal of this Honorable Court directed to the Honorable Circuit Court of Appeals for the Fifth Circuit, commanding that court to certify and to send to this Court for its review and determination on a day certain to be named therein a complete transcript of the record and all proceedings numbered and styled on its docket "No. 9777, Massachusetts Bonding & Insurance Company, Appellant, vs. Mrs. E. S. Massey, et al, Appellees" and that said judgment of the Circuit Court of Appeals may be reversed and rendered by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

WM. N. BONNER
Counsel for Petitioner.

BERT KING
Of Counsel for Petitioner.

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MASSACHUSETTS BONDING & INSURANCE COMPANY,
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MRS. E. S. MASSEY, ET AL, *Respondents*

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

OPINIONS OF THE COURT BELOW.

I.

This case was tried before a jury, hence there was no opinion of the District Court reported. The opinion of the United States Circuit Court of Appeals for the Fifth Circuit rendered on appeal is dated November 19th, 1941, and is found in the record at page 166, and is also reported in the Advance Sheets, 123 Federal Reporter (2) 447 to 449, inclusive.

II.

JURISDICTION

1. The date of the judgment to be reviewed is November 19th, 1941 (record, pp. 166-171). Motion for rehearing was filed under order extending time (record, page 172 for order, page 173 for petition for rehearing). Order denying rehearing was made without written opinion January 12th, 1942 (record, page 181). The amount sued for was 360 weeks at $20.00 per week, or $7,200.00, and jurisdiction of the lower court was obtained by reason of the amount involved and diversity of citizenship, as alleged by petitioner (record, page 2); such diversity of citizenship is admitted, paragraph 4 of answer of respondent below (record, pp. 6 & 7).

2. Respondent alleged as a cause of action that Massey strained, over-exerted, and tore himself on August 31st, and that on November 15th he injured and strained himself and aggravated previous injuries, and on November 28th he further injured himself by working, and aggravated his previous injuries, and that near noon of November 29th, 1939, he died of syphilitic heart failure.

Relator denied by its answer that the facts alleged constituted a case, and it particularly now says that the facts proved do not show that the deceased received a compensable injury under the Texas Workmen's Compensation Act and the cases as decided by our courts.

Under the new rules, the pleadings make little difference. It is the evidence that the courts must look to, and it shows, as we will set out more fully hereafter, that on August 31st deceased did nothing that strained or injured him, and he complained only of being tired and uncomfortable that night, and the evidence shows that his heart was then in such condition that on the following day one of the neighbors standing at the foot of the bed was disturbed by the noise made by the leaky valves of his heart. The proof will show that on November 15th, the next date alleged, that Massey did not so much as raise his hands. He merely assisted in giving some orders, and did not work at all, and had no opportunity to strain himself, and that on November 28th, while he was up until some 11:30 that night, and was out early the next morning, there was no proof of any over-exertion or strain or any untoward accident of any kind.

At the close of the evidence petitioner requested a preemptory instruction in its favor, which was denied, and petitioner excepted thereto (record, page 148).

Petitioner particularly requested that the jury be instructed not to consider the incidents happening August 31st, and what was known as the cooler incident, which was the day's work he alleged he suffered from about November 15th, and the charge was excepted to because same failed to limit the jury in their consideration to the events of the 28th and 29th only, and in failing to exclude August 21st and November 15th (see record, page 154, top

page 155). The judgment of the lower court was affirmed by the Circuit Court of Appeals (record, pp. 166-170) and rehearing was denied (record, pg. 181).

The holding of the Circuit Court of Appeals which we now complain of is in substance contained in the quotations from the opinion, as follows:

> "We cannot agree with appellant. It is well settled that the Texas Workmen's Compensation law does not cover death solely from disease, occupational or otherwise, but only death or other disability, physically resulting from exertion or other work activities, connected with his employment. . . . . ..
>
> . . . Appellant's argument seems to be very much like that which was advanced, but did not prevail, in the Brodtmann case, supra, that there must be direct evidence that the death was caused by, that is connecting the death with, a particular exertion or activity. This will not do. It is sufficient if taking all the facts and circumstances, there is a reasonable basis for the conclusion that in the course of his employment, there was an exertion, the accidental and unlooked for result of which was a physical injury to his heart causing its failure and his death.
>
> . . . The Workmen's Compensation Act contains no words excluding from the benefit of its provisions employees who are weak or sick. Such employees are as fully protected under the act from death or disabilities caused by injuries received in the course of their employment as are employees who are entirely well and strong. The only thing the act requires is that the death or injury for which compensation is sought be shown to be wholly or partly the result of some

work or activity connected with the employment, and not mere result of disease, which operating in its ordinary and natural course and without regard to the employment and its activities brings about his death.
* * * *

The evidence in this case was sufficient to support such a conclusion. The motion for an instructed verdict was properly denied. Appellant's other assignment that there was error in permitting evidence of the claimed injuries in August and November is without merit. This is so both because the evidence came in without objection and because if it had been objected to, it was admissible and relevant upon the issue of plaintiff's condition and the effects upon the heart of the exertions required by his employment."

3. Jurisdiction is invoked under Title 28, Section 347, United States Code Annotated:

"(a) That in any case civil or criminal, . . . it shall be competent for the Supreme Court of the United States upon petition of any party thereto . . . to require by certiorari, either before or after judgment or decree by such lower court, that the case be certified to the Supreme Court for determination by it, with the same power and authority, and with like effect as if it has been . . . .

(b) . . .

(c) No judgment or decree of a Circuit Court of Appeals, ... shall be subject to review by the Supreme Court otherwise than ~~subject to review by the~~ as provided in that section."

Cases pertinent under the first reason relied on for allowance of the writ. (We divide this into three parts): (1)

accident; (2) time and place; and (3) hazards greater than to which the general public is exposed:

(1) Accident:

Article 8309, Sec. 1, Subdv. 5, R. C. S.; (see pg. hereof for quotation);

Middleton vs. Texas Power & Light Co., 108 Texas 98-109; 185 S.W. 556;

Gordon vs. Travelers Insurance Company, 287 S.W. 911;

Travelers Insurance Company vs. Lancaster, 71 S.W. (2) 318;

Barron vs. TEIA, 36 S.W. (2) 464;

United States Casualty Co. vs. Vance, 91 S.W. (2) 465;

Choate v. Hartford, 54 S.W. (2) 901, (writ refused) and the many cases cited.

(2) Time and Place:

Southern Casualty Company vs. Flores, 1 S.W. (2) 260;

Odom vs. Indemnity Insurance Company, 111 S.W. (2) 1143 (par. 5, pg. 1146, to close);

Consolidated Underwriter vs. Christal, (writ refused), 35 S.W. (2) 127.

(3) Hazards Greater than to which the General Public is Exposed:

Southern Casualty Company vs. Flores, 1 S.W. (2) 260;

Fidelity & Casualty Company of New York vs. Neas, 93 Fed. (2) 137.

III.

STATEMENT OF THE CASE

Under the new rules the liberal admission of testimony makes it necessary, we think, to look to the basis of the proof rather than the pleadings. The three incidents, events, or accidents relied on by relators were (1) the day of August 31st, (2) the day the cooler was installed, about November 15th, and (3) the day of November 28th. At each of these instances there was only one witness present. Relator's witness, Lawson, was present the day of August 31st. The following testimony by Lawson is pertinent that no strain or injury of any kind happened:

"Q. You have done many days' work where the work was infinitely heavier and harder than it was there, haven't you?

A. I have done some heavier, and I have done some that was not so heavy.

Q. Sometimes you didn't do anything hardly, did you, but you had done, on many leases, you have done many times heavier work than occurred out there that afternoon?

A. I have done heavier work than that.

Q. Now, there was not a complaint or a thing in the world said by Skeet Massey that afternoon that would indicate to you that he had an injury in any way in the world, was there, until after you got to the house, and that would not indicate it?

A. Well, just saying he was petered out.

Q. What is that?

A. The only thing I heard him complain about was that afternoon when we stopped after we had signed the time sheet.

Q. And he merely told you that he felt like he had put in a day?

A. Yes, sir.

Q. And was tired, or something like that?

A. Yes, sir.

Q. And down there during the whole afternoon, he had not complained to you a word of any kind or character, did he?

A. He sat down under—

Q. In the shade a little bit, to cool?

A. Yes, sir.

Q. Now, that was some little bit after he carried the joint that you thought maybe was heavier, wasn't it?

A. I don't remember.

Q. You just remember he sat down a little while that afternoon?

A. Yes, sir.

Q. During that afternoon, there was not a thing in the world to call your attention in any way, that there was any difference in that and any other half a day's work you ever did?

A. No, sir, just common old work.

Q. Just common everyday work?

A. Yes, sir."

Relator's witness, Ballowe, was the only one who testified as to the cooler incident, and he says (record, page 65):

All Massey did on the cooler was to direct the work.

Mrs. Massey said (record, page 81):

"Q. Did Mr. Massey assist, or at least on the job and supervising that job?

A. Well, he was out on the job, but I was not out there.

Q. You do know he was out on the job?

A. Yes, sir."

And on the third incident, the day of the 28th and the morning of the 29th of November, Ballowe was the man hired to do the work, and the only one present, and he testified (record, page 67):

"Q. But ordinarily you do not have to turn it (the engine) over, do you?

A. No, sir.

Q. As long as you stayed there he didn't help you any to speak of?

A. Yes, sir, he helped me some but not much.

Q. You didn't see him do anything there that night *before you left that would have strained him*, did you?

A. *No, sir.*"

(middle of page 68, record):

"Q. Now when you left at 11:15

(the engine was up and running)

he just merely told you that he thought he would stand around a little while longer?

A. Yes, sir."

He goes on just following this to say the engine had been running thirty minutes when he left, and that he stayed long enough that he thought there was not anything going to happen to the engine.

"Q. After it had been running nicely that long you assumed it was probably out of the woods, as we say, and you went home?

A. Yes, sir.

Q. In other words, you were the man hired to do the work down there?

A. Yes, sir.

Q. And did it?

A. Yes, sir."

Ballowe says, record page 113:

> "Q. I believe I asked you yesterday with regard to Massey, and he did no work that night (the night of the 28th), except directing you, to speak of?
>
> A. No, sir."

The record shows (page 128) the leak in the valves of his heart, on first seeing the doctor, "was then liable to destroy him any moment." Page 130 of the record, the doctor said:

> "He (Massey) was ripe for death, work or no work, and nobody could say that the work he did or did not do caused it, and be definite about it."

He further says that in death (record, pp. 130-1) there was no damage to the heart, that it simply failed. He further said:

> "Q. Now this disease (syphilitic heart failure), Doctor, takes a definite, set course as to its damage, and unless response to treatment is had early, the probabilities are that it will go straight through to death?
>
> A. That is true, absolutely correct.
>
> Q. And this man, for proper medical response and treatment, came to you to late, didn't he?
>
> A. Yes, sir."

Massey's heart was in such condition that when a friend visited him on the second day after August 31, he testified (record, pg. 70) that he stood at the foot of the bed and heard the blood from his heart gurgling and sloshing.

IV.

SPECIFICATION OF ERROR.

1). The Honorable Circuit Court of Appeals erred in holding that an injury, to be compensable under Texas Workmen's Compensation law, did not have to result from accidental injury definitely located as to time and place, but that death or injury was compensable if such injury "resulted from exertion or other work, activities connected with his employment."

2). The Honorable Circuit Court of Appeals erred in holding that it was not necessary "that there be direct evidence, that the death was caused by, that is, connecting the death with, a particular exertion or activity," because the Texas Courts hold that time and place of injury must be definitely shown.

3). The Honorable Circuit Court of Appeals erred in holding that you can choose any three unrelated days, a six weeks period between each event or day chosen—and where all of the days' work of a pumper are as much alike as peas in a pod—, and from these three days and incidents occurring on such days, with nothing in particular in the way of strain or exertion to mark them off from the other days that he had worked for a period of several years before, and six weeks after the first of such incidents, and allow a recovery for such incidents on the theory that the plaintiff had shown that he had a strain sufficient to constitute an accidental injury, one which was located suf-

ficiently as to time and place as distinguished from all of the other days that such pumper worked.

4). The Honorable Circuit Court of Appeals erred in holding that where syphilis has destroyed the valves of the muscles and the heart so that deceased was ripe for death, work or no work, and was injured from his disease to such an extent that "even to interfere with his rest" was in effect an invitation to death, and that where the deceased had done the same kind of work for years before the day charged, and after a rest period of a few weeks he continued the same kind of work for a month and a half to his death, and the witnesses say that on the three days chosen there was no particular strain or exertion that they saw or heard deceased complain of so as to mark it off from the other days he worked, and the court under such circumstances allowed Massey's beneficiaries to choose three days and incidents in those days that could not be differentiated from other days, and choosing these particular days and incidents, allow the respondent to recover, because such is contrary to our statutes and the settled law of the State of Texas, as is decided on *Odom vs. Indemnity Insurance Company*, 111 S.W. (2) 1143, and contrary to all the decisions of our courts holding that such accidents must be traced to a definite time and place.

5). The Honorable Circuit Court of Appeals erred in holding:

> "It is sufficient, if taking all of the facts and circumstances, there is reasonable basis for the conclu-

sion that in the course of his employment, there was an exertion, the accidental and unlooked for results of which a physical injury to his heart, causing its failure and his death."

6). The Honorable Circuit Court of Appeals erred because the holding in this case pyramids one presumption upon another in this: Our courts hold, *Southern Casualty Company vs. Flores:*

> *"Actual, physical injury, external or internal, must be shown in a proper way before an inference legally may be drawn that the final result is attributable to an injury originating in the employment."*

7. The Honorable Circuit Court of Appeals erred in holding that in case of injury from strain or exertion while working, that in order to recover, the injured party or his beneficiaries must show that his exposure to injury by strain and exertion was greater than that to which the general public was exposed.

8). The Honorable Circuit Court of Appeals erred in holding that the testimony covering the work of August 31st and November 15th was admissible, and in holding that the lower court was correct in refusing to instruct the jury not to consider same, as requested by relators.

V.

ARGUMENT

SUMMARY OF ARGUMENT

POINT A:

The decision of the Honorable Circuit Court of Appeals is in conflict with the decisions of the Supreme Court of Texas in holding that it is not necessary for the injured party or his beneficiaries to show, in order to recover compensation, that he suffered an accidental injury that could be definitely located as to time and place, but that death or injury was compensable if such injury "resulted from exertion or other work activities connected with his employment." (See Specifications of Error, 1 & 2).

POINT B:

The decision of the Honorable Circuit Court of Appeals is in conflict with the decisions of our Texas Supreme Court in holding that three days work, scattered over a period of three months, and undistinguished from the work of other days, might constitute such strain as would be compensable under the Texas Workmen's Compensation laws. (See Specifications of Error 3 & 4).

POINT C:

The decision of the Honorable Circuit Court of Appeals holding:

> "It is sufficient, if, taking all of the facts and circumstances, there is reasonable basis for the conclu-

> sion that in the course of his employment, there was an exertion, the accidental and unlooked for results of which was a physical injury to his heart, causing its failure and his death",

is in direct conflict with the holdings of our Texas Supreme Court, in holding, in effect, as set out above, that the injury did not have to be accidental at all, but it was sufficient if he worked and there were unlooked for results from his work. (See Specification of Error 5).

POINT D:

The decision of the Honorable Circuit Court of Appeals is in conflict with the decisions of the Supreme Court of Texas holding that you cannot pile presumption on presumption, which is the established law in Texas by the case of *Joske vs. Irvine*, 95 Texas 574, 44 S.W. 1059, as applied to compensation case in *Southern Casualty Co. vs. Flores*, 1 S.W. (2) 260. (See Specification of Error 6).

POINT E:

The decision of the Honorable Circuit Court of Appeals is in direct conflict with the decisions of our Texas Supreme Court in *Southern Casualty Company vs. Flores*, 1 S.W. (2) 260, holding that it must be shown that the employee's exposure to strain and exertion must be greater than that to which the general public is exposed.

POINT A.

The facts pertinent to this discussion are practically undisputed. As to the first day charged as to his injuries, to-wit, August 31st, his neighbor and his witness testified (record pg. 41).

> "Q.Now there was no complaint nor a thing in the world said by Skeet Massey that afternoon that would indicate to you that he had an accident in any way in the world, was there, until after you got to the house, and that would not indicate it?
>
> A. Well, just saying he was petered out."

Likewise his neighbor and witness, Ballowe, who gave testimony as to the cooler incident (record, page 65), testified:

> "Q. Now, when you were working on the cooler, about all that Massey did was to direct the work, give orders, wasn't it?
>
> A. Yes, sir . . ."

and his wife admitted she was not there. And again Ballowe, his helper, his neighbor, and relator's witness said (record, page 67) referring to the day and night of the 28th:

> "Q. As long as you stayed there he did not help you any to speak of?
>
> A. Yes, sir; he helped me some, but not much.
>
> Q. You did not see him do anything there that night before you left that would have strained him in any way, did you?

A. No, sir."

and he says (record, 133):

"Q. I believe I asked you yesterday with regard to Massey, and he did no work that night (the night of the 28th) except directing you, to speak of?

A. No, sir."

This record shows that this man had been a pumper for approximately ten years. It shows, according to his physician, that he had syphilitic heart failure for a period of from three to ten years. It shows that on the first he complained of being injured was, August 31st, and that he carried a few joints of pipe and did some connecting. The other two days or incidents relied on, about November 15th, and the last day before he died, he did nothing practically except direct the work. We have only the evidence of his neighbors and his wife, who were doing their utmost to help her recover. We submit that the Record shows that there was not a thing untoward, unusual or accidental in this record, and that there was no strain. At least there is not one single thing that we can see in this record that would indicate that Massey had more of a strain on any of these days than he had on any other day that he worked, and concededly he ran the outfit as pumper for the last six weeks before he died, and had been running it years before, and his own doctor testified that he was ripe for death every day, work or no work.

Our courts have said in the Flores case, cited herein:

> "The Workmen's Compensation law does not provide for health or accident insurance, and because it does not go that far, Flores' death must be regarded as being beyond its reach,"

and we submit that the Flores case, by our Supreme Court, is identical with this case in all of its particulars.

Subdivision 5 of Section 1, Art. 8309, R. C. S., is as follows:

> The terms "injury" and "personal injury" shall be construed to mean damage or harm to the physical structure of the body and such diseases or infections as naturally result therefrom.

This has been repeatedly construed by our Supreme Court to cover accidental injury only which may be located definitely as to time and place.

We find that Judge Phillips, a distinguished jurist of our Supreme Court, Chief Justice for a number of years, laid down the doctrine that the injury must be accidental in *Middleton vs. Texas Power & Light Company, supra,* and even bases the constitutionality of the act upon the fact that it was limited to accidental injury. Some of the opinions point out that the court reached the accidental conclusion from the fact that the caption of the act referred to accidental injuries, and it has also been discussed that the prerequisite for notice was to be given so many days from the "happening" of the injury. As we see it, however, this court is not concerned with how our

Supreme Court reached its conclusion; suffice it to say that they have reached that conclusion.

In the Barron case, supra, it is said, after holding that it must be accidental injury, that

> "A distinguishing characteristic of an accidental injury is that it can always be traced to a definite time, place and cause."

You will find in the case of *United States Casualty Company vs. Vance, supra*, it is held that the courts have read into the statutory definition of injury the element of accident, and Judge Sibley, in the first case cited in the court below, *Fidelity & Casualty Co. vs. Neas*, 93 Fed. (2) 137, quoted himself and others in *Henderson vs. Maryland Casualty Company*, 62 Fed. (2) 107, wherein the court used the expression "accidental injury", describing it as

> "One occurring unexpectedly, not in the natural course of events, and must be capable of being traced to a definite time, place and cause."

In the Neas case the man had climbed a light pole, and had immediately ascended another pole, and coming down, he staggered backward when he got to the ground, slumped down, and was taken to a hospital, and died. Judge Sibley said:

> "In the present case Neas was required by his employment to climb poles, *involving an exertion far greater than the ordinary public would ordinarily undergo.* If that exertion *THEN AND THERE* caused a brain hemorrhage which would not otherwise

> have happened, there was an injury originating in the work from which the statute requires industry to make compensation."

As we see it, not only did the relator fail to show anything that would constitute an accident or a strain, but utterly failed to differentiate the work he did on any of these three days alleged from any of the other days that he worked. If the court is right in this opinion, then we must say that if Massey is injured, all of his work contributed to that injury, for all of his days required as great or greater effort than these three days. And if this is true, then it must follow that any man who has a damaged heart through his own fault, as Massey had, and if he works at anything, whenever he dies, under the law he will receive Workmen's Compensation insurance. The evidence shows that he had no physical damage to his heart, but that it merely failed, and that action of any kind might contribute to its failure. There is no case in Texas that can be pointed out as holding that such is a correct statement of the law.

POINT B.

The Odom case, supra, is to the effect that you cannot pick up various incidents, and add them together, in order to get an injury, and the Chrystal case, supra, quotes from 45 Tex. Jur. page 494, to the effect that compensation is allowed for injury.

> "resulting from strain, and those sustained where strain resulted in the bursting of a blood vessel, and

consequently appoplexy and death or partial paralysis where such injuries flowed from something *out of the ordinary and unexpected, and were definitely located as to time and place.* Whatever the physical condition of the individual may have been, if it was such that some physical exertion or strain was required to cause the rupture, the injury may be classed as an accidental one."

POINT C.

The holding here is, we think, not only one contrary to all of the Texas decisions, but so far as we have been able to find, prior to this there has been no authority that held that where, in line with his work,

> "There was an exertion, the accidental and unlooked for result of which was a physical injury,"

it was sufficient. We had always thought that results were not accidental, but here they take the accident away from the injury and make the result of a strain, if it is unlooked for, accidental.

If a man does only the ordinary work of his employment, and he chooses three particular days out of several years upon which to base his claim for injury, and there is no evidence that he ever complained on these three days of receiving a strain or extra exertion, and his witnesses and neighbors who testify for him testify that there was no such complaint, and that on the last two days complained of he merely directed the work and did nothing to strain himself, and the evidence shows that there is prac-

tically no difference in these days' work and the other days that he worked, then it must follow, we think, that where the evidence shows that he was afflicted with syphilitic heart failure and scheduled to die in a given period, if the holding in this case is correct then one who is so afflicted and is employed at all and dies from his affliction, must be paid compensation. The Compensation Laws of our State were not made, nor have they been interpreted so as to be given such construction. See the quotation set out above as the settled law from 45 Tex. Jur., page 494.

POINT D.

As the court so aptly points out in the Flores case, supra:

> The reasoning proceeds: (a) It is possible that the exertion caused some undisclosed "harm or damage to the physical structure of the body," although the same "harm or damage" may as well have occurred if Flores had been walking toward 228 Argyle Avenue in search of employment; therefore, some such "harm or damage" did occur. (b) Since "harm or damage" did occur, although its nature or degree is unknown, it caused or contributed to cause death. The basic data, it may be conceded, make up a scintilla of evidence; but so long as the doctrine of Joske vs. Irvine, 91 Texas 574, 44 S.W. 1059, remains in effect, the data cannot be regarded as evidence itself touching the important matter.
>
> "The Workmen's Compensation Law does not provide for health or accident insurance; and because it does

not go that far, Flores' death must be regarded as beyond its reach."

The court then goes into many cases, and at the middle of the next to the last column of the opinion the court concludes:

> "But in each of them it will be found there was evidence assumed to show actual injury to body or parts,"

then he sets out a long list of cases with some injury in each, and concludes:

> Whether the case in the two lines as last above discussed may be entire reconciled on principle, they all appear to proceed upon the theory *that actual physical injury, internal or external, must be shown in a proper way* before an inference legally may be drawn that the final result (in respect to which compensation is claimed) is attributable to an "injury" originating in the employment. And, as indicated, most, if not all, of the cases from other jurisdictions includes that postulate. In the present case there is absent the proof of "injury" which was actually or assumedly present in the other cases.

PART E.

Supporting our contention here, we must quote from the Flores case, supra, as follows:

> Syphilis and its resultant, of course, had no origin in the employment. Their presence in that degree which converted the slightest physical exertion into invitation to death being shown by evidence in which there is no contradiction, the case belongs to that

class in which the supposed "injury" comes "from a hazard to which the workman would have been equally exposed apart from the employment," and hence, is noncompensable.

CONCLUSION.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, and that a writ of certiorari should be granted and that this Court should review the decision of the Circuit Court of Appeals and finally reverse the same.

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No. 1066

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

MASSACHUSETTS BONDING & INSURANCE COMPANY,
Petitioner

vs.

MRS. E. S. MASSEY ET AL.,
Respondents

BRIEF OF RESPONDENTS

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E. Duncan & Co., Brief Printers, Dallas

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BRIEF OF RESPONDENTS

May it Please the Court:

In reply to the petition of the Massachusetts Bonding & Insurance Company for a writ of certiorari in the above entitled and numbered cause and the brief in support thereof the respondents respectfully present to this Honorable Court the following:

STATEMENT OF THE CASE

On behalf of the respondents it is desired to set forth that this is a suit for workman's compensation insurance

under the Workmen's Compensation Act of Texas. On the trial in the District Court the cause was submitted to a jury and resulted in a verdict and judgment for the respondents. Said judgment was affirmed by the Circuit Court of Appeals for the Fifth Circuit (123 Fed. 2d 447; R. 166). Motion for rehearing was denied January 12, 1942 (R. 181). Respondents alleged that injuries received in the course of employment contributed to and brought about the death of E. S. Massey, an employee of the Royal Oil & Gas Corporation. Apparently the only controversy hinges upon whether injuries received by the said E. S. Massey in the course of his employment contributed to his death, or heart failure was the sole cause of his death. The petitioner contends that the decision in this cause is repugnant to the Workmen's Compensation Act of Texas, contrary to the decisions of the Supreme Court of Texas, and in conflict with decisions of the Circuit Courts of Appeals. Respondents represent that the decision is exactly in accord with said Workmen's Compensation Act of Texas and in complete harmony with the decisions of the Circuit Courts of Appeals, the Supreme Court of Texas, and the Courts of Civil Appeals of Texas. The essence of the legal situation herein presented seems to be to the effect that the petitioner claims: (1) that the evidence is not sufficient to sustain the verdict and judgment; and (2) that certain evidence was not admissible and should not have been permitted to go to the jury. The respondents take the position: (1) that the evidence is sufficient to sustain the verdict and judgment; (2) that the evidence of which com-

plaint is made was admissible; and (3) that no proper and timely objection was made to said evidence.

SUMMARY OF ARGUMENT

In accordance with said legal situation herein the respondents respectfully present for the consideration of the Court the following points, to-wit:

I.

The evidence is sufficient to sustain the verdict.

II.

The evidence of which complaint is made was admissible.

III.

No proper and timely objection was made to said evidence.

ARGUMENT AND AUTHORITIES

I.

The evidence is sufficient to sustain the verdict.

In view of the outstanding opinions announced by the Federal Courts and by the State Courts of Texas to the effect that a verdict of a jury will not be disturbed if there is any competent evidence to sustain said verdict, the re-

spondents will here attempt only a short summary of the situation presented in this case. We think we are fully justified in saying that the evidence in this cause shows that E. S. Massey, the deceased employee, was a man of robust appearance, strong and capable, with every evidence and appearance of good health until August 31, 1939, and that he spent that day working in the hot sun at tasks which required sufficient exertion to produce a strain upon his heart. In the light of the evidence it certainly appears that he had been afflicted with heart disease for some considerable time, although such affliction was unknown. During the work on August 31, 1939 Mr. Massey found it necessary to stop and rest, which was contrary to his previous habits when engaged in the performance of the duties of his employment. At the close of that day's work Mr. Massey made the complaint of being unusually weary and during the ensuing few days suffered from rather severe heart attacks and discomfort. It further appears that Mr. Massey was treated for his heart condition, a part of said treatment being a few days confinement to the hospital, followed by several days of almost complete rest and relaxation. Mr. Massey returned to light duties about October 15, 1939, and about a month later put in a rather trying and strenuous day supervising and assisting in the installation of a cooler at his place of employment, following which he suffered from weariness and discomfort. The evidence shows that from and after the instances of August 31, 1939 and of the installation of said cooler Mr. Massey tired easily and rested more frequently than had been his

custom. Then early on the morning of November 28, 1939 it is shown that the engine which furnished the power for the operation of the oil lease went dead sometime before daylight, and that Mr. Massey in the performance of his duties went out to the powerhouse where the engine was located and worked until about one or one-thirty in the afternoon; that he then went to the nearby town of Archer City, received a letter containing instructions to put a new head on the engine at the lease, ate his breakfast and luncheon all in one meal, proceeded to Wichita Falls to get said head for the engine, returned to Archer City, arranged for the assistance of a helper, and that the two of them continued their work until nearly midnight; that early on the morning of November 29, 1939, the engine having stopped again, Mr. Massey returned to work and worked until around eleven o'clock that morning; that Mr. Massey then came to the house to take off his wet clothes and remained in the house about ten or fifteen minutes, then went out to the garage to go see about the oil tanks on the lease and a few minutes thereafter was found dead by the side of the car in the garage. The witness, Dr. William L. Powers, who had been Mr. Massey's physician since a short while after the incident of August 31, 1939, testified that Mr. Massey had a rather severe form of heart disease, that he had recommended absolute bed rest and the use of various drugs for his heart, and that the treatment for his particular type of heart disease consisted principally of bed rest and the use of drugs (R. 121). Dr. Powers further testified that any degree of activity steps up the heart rate to a

certain extent, that is the reason we put a man at bed rest when he has a heart disease, to slow the heart down and give his heart a chance to rest, and that condition would be increased by any increased activity or exertion; that Mr. Massey showed definite evidence of clinical improvement during that period of time (R. 121). Dr. Powers further testified as follows: "I feel this way about that, that work of that nature, if it involves any exertion or any interference with rest, that it would have a definite bearing on, certainly impairing that man's heart further. I feel that anything that interferes or puts an extra load on the heart, which exertion or manual labor or work of any nature would do, would certainly be a contributing factor to a patient's heart failure." (R. 124).

The above would appear to be a rather brief summary of the evidence relevant to this man's injuries and death. Other portions of the evidence tend to strengthen and emphasize the relation between Mr. Massey's injuries in his employment and his consequent death. However, such brief summary, or even a casual glance at the evidence in this cause, should be amply sufficient to bring it within the purview of the rules laid down by the Federal Courts as well as the Texas Courts. The decisions herewith cited clearly and unmistakably announce the rule that a trial court is only authorized to instruct the jury to return a directed verdict when there is no evidence of probative force in support of the contention of the party against whom the verdict is directed. If the evidence upon the con-

trolling controverted issues is such that reasonable minds could differ in its construction and application a directed verdict should not be given. It is also announced by said courts as the settled law that a compensation claimant, even though he was partially incapacitated from disease prior to the time he received an injury for which compensation is sought, is nevertheless entitled to recover compensation for the full amount which he was entitled to receive without reference to the disease; that whatever the physical condition of an individual may be, if it is such that it requires some physical exertion or strain to cause the injury, such injury is accidental and compensable; and that if the employment is a contributing cause of the injury, a claimant is entitled to recover.

The position assumed by the petitioner would seem more ingenious than applicable. In *Fidelity and Casualty Company of New York vs. Neas*, 93 Fed. 2nd, 137, it was held that a workman who climbed two poles in the course of his employment and died from cerebral hemorrhage was entitled to recover compensation for such injury, and that the Texas Workmen's Compensation Law does not require that an accident in the work, in the sense of something that unexpectedly caused unusual exertion or overstrain, occur in order to authorize compensation. In *Hartford Accident and Indemnity Company v. Jones*, 80 Fed. 2nd, 680, the court held that the evidence was sufficient to sustain a finding to the effect that the employee had sustained a compensable injury, and that if there is a real injury to an employee,

the background of his peculiarities will not defeat recovery of compensation. In *Brodtmann v. Zurich Accident and Liability Insurance Company*, 90 Fed. 2nd, 1, the court announced the rules that an injury is none the less compensable because pre-existence of a diseased condition has made serious or fatal what would not otherwise have been so, and that damage or harm to the physical structure of the body need not be external or visible, nor must it be established by direct evidence, but may be established by circumstances pointing to internal rupture or physical disturbance with sufficient definiteness to support a reasonable common sense conclusion that harm has occurred. In *Federal Underwriters Exchange v. Polson*, 148 S.W. 2nd, 956, the court sustained a jury verdict based upon evidence showing that an employee sustained an injury to his heart on January 9, 1939, in pulling the lever on a boomer fastening down a chain on a truck. Said employee died from heart disease several months later, on August 9, 1939. The court, in holding that the evidence was sufficient, cited a number of well considered cases, and made it clear that the evidence was sufficient to uphold a recovery under the Texas Workmen's Compensation Law. In said case the Supreme Court of Texas recently dismissed the application for writ of error, holding that the judgment was correct. In *Southern Underwriters v. Hoopes, et al.*, 120 S.W. 2nd, 924, it appears that the appellant assumed almost the identical position assumed by the petitioner in the case at bar. In said case the deceased had a pre-existing diseased condition of his heart, and suffered a strain while lifting a sill.

The court held that the evidence was sufficient and the injury compensable. Referring to the argument advanced by the insurance company, the court uses the following significant language: "The argument * * * * though syllogistic and logical from the premises chosen, is inept in the selection of that foundation for it."

The Court of Civil Appeals at Texarkana, Texas in *Texas State Highway Department v. Butler, et al.*, 158 S. W. 2nd, 878, under date of February 5, 1942 held that in compensation proceeding against the State Highway Department, evidence that the death of the employee was caused by a heart injury while working at a road roller for the Department raised issues for the jury whether deceased sustained an accidental injury and whether such injury was a producing cause of his death. Said case appears directly in point with the case now before the court in that the evidence clearly shows a very similar situation. The employee complained of symptoms almost identical with those of which Mr. Massey complained. He sustained the injury on April 12, 1939. His death occurred on May 11, 1939. He suffered from sensations of indigestion and choking. The chief difference in the two cases seems to be that Mr. Butler was not shown to have engaged in any strenuous labor just prior to his death, whereas the evidence shows that Mr. Massey was engaged in the duties of his employment immediately prior to his death. Therefore while the legal principles applicable to the two cases are

the same, the facts are more strongly in favor of recovery by the claimants in this case than in the Butler case.

In *Texas Employers Insurance Association v. Shifflette*, 91 S.W. 2nd, 787, the court held that the question of whether an employee suffering from heart disease, who walked up four flights of stairs in the course of his employment when the elevator was not operating, who continued to work that day, and died during the following night, sustained a compensable injury which contributed to his death, was for the jury to decide.

Certainly the evidence in the case now before the court is of greater weight than the evidence in the case just above cited, as well as many of the other cases in which various courts have sustained a finding of compensable injury. Such cases clearly announce undeniable principles of law and justice. If such decisions are correct, and they are, *a fortiori* the evidence in this cause is more than sufficient to sustain the verdict of the jury, and the injury is compensable under the Workmen's Compensation Law of Texas. Because of the similarity in the questions involved and in the arguments advanced by the insurance company, it is desired to call attention to *Travelers Insurance Company v. Johnson, et al.*, 84 S.W. 2nd, 354, in which it was held that the evidence was sufficient to sustain a finding that the employee's death from rupture of an aneurysm of the aorta resulted from exertion in operating a large wrench in tightening cylinder heads, and not from a syphilitic condition, and hence was compensable. Much of the

same argument was there advanced on behalf of the insurance company in much the same manner as appears in the case now before the court. The court, after discussing the various arguments and evidence, stated: "It is seen that the evidence raised the issue submitted, and amply supports the findings of the jury." In *Texas Indemnity Insurance Company v. Staggs, et al.*, 134 S.W. 2nd, 1026, the court announces clearly the legal principles applicable to suits of this character, to the effect that compensation will not be denied, although injury may be aggravated or enhanced by the effect of disease existing at the time or afterwards occurring; that the purpose of the Workmen's Compensation Law is to extend compensation to employees injured in the course of employment without reference to the negligence of the employer, and stricter rule should not be applied in compensation cases for tracing results to causes than is appropriate in negligence cases; and that injuries suffered by an employee in the course of his employment, to be compensable, need not be the sole cause of disability or death, and compensation should not be denied when the injury causes disability or death not of itself but concurrently with another injury or cause.

Therefore it clearly appears that the evidence is amply sufficient to sustain the verdict of the jury in this cause, and that the petition for writ of certiorari should be in all things denied.

II.

The evidence of which complaint is made was admissible.

It is believed that the authorities heretofore cited, and the comments upon the evidence, taken in connection with a reference to the evidence itself, clearly demonstrates that the evidence with reference to what took place on August 31, 1939, and on the date when the cooler was fixed, was without doubt admissible. The arguments advanced appear to discuss the weight rather than the admissibility of said evidence. A jury is entitled to hear and consider all of the relevant evidence germane to the issues involved. Therefore any incident indicating to any extent that the deceased may have sustained an injury in the course of his employment which contributed to his death was admissible. Certainly the occurrences on the two occasions mentioned here offer evidence of injuries sustained by E. S. Massey in the course of his employment. The weight to be given that evidence was for the jury to determine. Therefore, it is the position of the respondents that said evidence was clearly admissible.

III.

No proper and timely objection was made to said evidence.

Even though we assume for the purpose of this argument that said evidence was not admissible, the record clearly discloses that no objection was entered at the time the evidence was offered. Surely a party who fails to object to

evidence at the time it is offered waives any right he may have had to object thereto, and can not thereafter be heard to argue that a case should be reversed on account of the admission of evidence to which he had made no objection.

CONCLUSION

Let it be recalled that following the occurrences of August 31, 1939 and the occasion on which the cooler was fixed, Mr. Massey suffered great discomfort and uneasiness; that his first known heart attack followed immediately the circumstances occurring on August 31, 1939; that the work in which he was engaged on the day the cooler was fixed was immediately followed by exhaustion, pain and discomfort; that the strenuous work and long hours, together with the attending circumstances, occurring on November 28, 1939 and November 29, 1939 were almost immediately followed by death; and that the principles applicable to the facts of this case have been repeatedly and clearly announced by the courts.

It is noted that Rule 38, section 5, provides: "A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor." One of the reasons mentioned is where there exists conflict between decisions of Circuit Courts of Appeal. No conflict exists here, and all the decisions are in perfect harmony and complete accord on the questions involved in this cause. As aptly and clearly pointed out in the opinion of the Circuit

Court of Appeals (See 123 Fed. 2nd, 449): "The authorities on which appellant relies are not in conflict with these. They present cases of the application of the principle to facts which did not make out a case for recovery. Appellant's argument seems to be very much like that which was advanced, but did not prevail, in the Brodtmann case, supra, that there must be direct evidence that the death was caused by, that is, connecting the death with, a particular exertion or activity. This will not do. It is sufficient if taking all the facts and circumstances, there is a reasonable basis for the conclusion that in the course of his employment, there was an exertion, the accidental and unlooked for result of which was a physical injury to his heart causing its failure and his death." To the same effect are the other authorities cited herein, and the courts of the United States and of the State of Texas have consistently followed the rule thus laid down. We know of no authority to the contrary, and none that in any way conflicts with the above holding.

Wherefore respondents respectfully pray the Court that the petition for writ of certiorari be in all things denied.

Respectfully submitted,

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